UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: 12/21/92

FAA Order No. 92-75

In the Matter of:	
THOMAS A. BECK	Docket No. CP91EA0424

DECISION AND ORDER

Respondent Thomas A. Beck appeals from the oral initial decision issued by Administrative Law Judge Burton S. Kolko on February 14, 1992.[1/] The complaint alleged violations of Sections 91.405(a)[2/] and 91.409(a)(1)[3/] of the Federal Aviation Regulations (FAR). Respondent allegedly operated his aircraft approximately nine times when it had not been inspected and approved for return to service within the

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1/ A copy of the law judge's order is attached.

2/ This rule states, in relevant part, that: "Each owner or operator of an aircraft shall have that aircraft inspected as prescribed in subpart E of this part ...." 14 C.F.R. § 91.405(a).

3/ This regulation provides, in pertinent part, that:

> ... [N]o person may operate an aircraft unless, within the preceding 12 calendar months, it has had--
> (1) An annual inspection in accordance with part 43 of this chapter and has been approved for return to service by a person authorized by § 43.7 of this chapter ....

14 C.F.R. § 91.409(a)(1).

preceding 12 calendar months. The merits, however, are not at issue here because Respondent failed to answer the complaint.

A week before the hearing, Complainant filed a Motion for Decision asking the law judge to deem the allegations of the complaint admitted and to assess a civil penalty of $1,000 under Section 13.209(f) of the Rules of Practice.[4/] Two days before the hearing, Respondent sent the law judge and opposing counsel, by overnight mail, a motion for a continuance. In his motion, Respondent said that he needed more time for settlement negotiations.[5/] He also requested postponement of the hearing because he had not yet received replies to letters he had sent to the Office of Management and Budget (OMB)[6/] and

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4/ 14 C.F.R. § 13.209(f) provides: "A person's failure to file an answer without good cause shall be deemed an admission of the truth of each allegation contained in the complaint."

5/ The agency attorney objected because Respondent had ignored repeated attempts to contact him to discuss settlement in the 6 months preceding the hearing. Tr. at 4; Motion for Decision at 2. Also, when Respondent did discuss settlement shortly before the hearing, he offered to pay only $5.

6/ Respondent apparently intended to argue that it was improper for FAA inspectors to check his aircraft records. In his request for hearing, Respondent asked why agency documents used against him did not have an OMB control number. Respondent cited OMB rules that prohibit federal agencies from collecting information without OMB approval and display of a currently valid OMB control number. 5 C.F.R. Part 1320.

However, as Complainant points out, the OMB rules cited by Respondent do not apply. The provision regarding applicability states, in relevant part, as follows:

> The requirements of this part apply to ... all collections of information conducted ... by agencies ... except for collections of information ... during the conduct of an administrative action or investigation involving an agency against specific individuals ....

5 C.F.R. § 1320.3(c). (Emphasis added.)

to his Congressman.[7/]

Respondent did not appear at the hearing. The law judge denied his motion for a continuance, finding it "frivolous on all counts." Tr. at 6. The law judge then granted Complainant's Motion for Decision on two independent grounds:

(1) Respondent's failure to answer the complaint without good cause; and

(2) Respondent's failure to appear at the hearing.

The law judge found that Respondent had been advised repeatedly of the requirement to file an answer, and that Respondent had received the Rules of Practice. He held that good cause for Respondent's failure to file an answer had not been shown.

The law judge also held that Respondent's failure to appear at the hearing constituted a withdrawal of the request for hearing. He stated that filing a frivolous motion for continuance on the eve of the hearing could not cure the withdrawal. He ordered Respondent to pay a civil penalty of $1,000, the amount stated in the complaint. Respondent's appeal asks the Administrator to set aside the law judge's decision and either dismiss the complaint or order a new hearing.

7/ Respondent stated that he had requested information from his Congressman about the FAA's civil penalty assessment demonstration program. The agency attorney argued that this information was irrelevant.

Respondent's appeal is denied. Respondent forfeited his opportunity to contest both the alleged violations and the sanction amount when he failed to appear at the hearing. As the law judge held, failing to appear at the hearing constitutes a withdrawal of one's request for hearing.[8/] Furthermore, merely filing a motion for a continuance does not mean it will be granted. This is particularly true when, as here, the motion is filed on the eve of the hearing and contains no valid reasons for granting a continuance.

Respondent argues that the agency attorney caused him to delay filing his motion for continuance by approaching him with correspondence and telephone calls suggesting a settlement. The record shows that about a month before the hearing, Complainant sent Respondent a letter stating as follows:

> This office has attempted unsuccessfully to contact you by telephone. We are requesting that you contact this office so that we may discuss settlement of this matter. Please note that we have evidence that you acknowledged receipt of the complaint on July 29, 1991. Please also note that should you need a continuance of the hearing date, you must contact the Docket Clerk.

Respondent did not contact Complainant to discuss settlement until 6 working days before the hearing. Respondent offered to pay a $5 civil penalty, and Complainant rejected that offer. Nothing in the record supports Respondent's claim that he was

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8/ See In the Matter of Cullop, FAA Order No. 92-50 (July 22, 1992), affirming a law judge's decision finding that Respondent had withdrawn his request for hearing by failing to appear. The law judge summarily imposed the $1,000 penalty requested in the complaint.

misled concerning settlement negotiations. If Respondent genuinely intended to seek settlement, he should have either begun negotiating sooner, moved for a continuance sooner, or both. Law judges and litigants must prepare for and travel to hearings at considerable inconvenience and expense. Filing a frivolous motion for continuance that will not be received until the eve of the hearing is unfair to both the law judge and the opposing party.

Respondent also argues on appeal that he denied "each and every allegation of misconduct or violation, in writing, by certified mail within 35 days of the notice of proposed civilpenalty, pursuant to 13.209(a)."[9/] He claims, too, that genuine issues of material fact are still at issue. These arguments need not be addressed because Respondent's appeal has been disposed of on Respondent's failure to appear at the hearing. However, it bears mentioning that Section 13.209(a) of the Rules of Practice provides that: "A respondent shall file a written answer to the complaint ... not later than 30 days after service of the complaint." 14 C.F.R. § 13.209(a).

9/ Respondent apparently wrote a letter responding to Complainant's Notice of Proposed Civil Penalty on March 20, 1991. This letter is not in the docket. According to Complainant's reply brief, Respondent's letter stated that he was operating his brother's aircraft rather than his own during the time period that his aircraft could not be legally operated. Respondent claimed he had mistakenly written his own aircraft's identification number in his logbook and that no violation had actually occurred.

(Emphasis added.)[10/] This requirement is not satisfied by filing an answer to the notice of proposed civil penalty. Complainant issues the notice of proposed civil penalty at an earlier stage of the proceedings than the complaint. A response to agency communications that is sent before the complaint has even been issued cannot be considered an answer to the complaint. In the Matter of Barnhill, FAA Order No. 92-32 (May 5, 1992). To hold otherwise would be to eliminate, in effect, the requirement in the rules for an answer to the complaint. Id. at 6.

The record shows that Respondent knew that his response to the notice of proposed civil penalty did not fulfill the requirement to answer the complaint. In a letter to the law judge, Respondent stated:

> At such time as I receive, or become aware of a "Complaint," I will respond to each paragraph as you require ...

(Emphasis added.) This letter was written a number of months after Respondent replied to the notice of proposed civil penalty.[11/]

10/ A respondent has 5 additional days to answer if the compl aint is served by mail. 14 C.F.R § 13.210(e).

11/ Although Respondent claimed in the same letter that he had not received the complaint, the return receipt in the record bearing Respondent's signature proves otherwise. Implicit in the law judge's decision is the finding that Respondent received the complaint. This finding will not be disturbed. In any event, Respondent apparently has not renewed on appeal his claim that he did not receive the complaint.

Failure to file an answer is excusable for good cause. Here, however, Respondent never even attempted, after he was informed of the default, to cure it by filing an answer.[12/] Even if this case had not already been disposed of on another ground, it is highly unlikely that good cause would be found under all the circumstances.

For the above reasons, a civil penalty of $1,000 is assessed.[13/]

THOMAS C. RICHARDS, ADMINISTRATOR
Federal Aviation Administration

Issued this 17th day of December, 1992.

12/ Complainant should be aware that the filing of motions for decision so close to the hearing date is strongly discouraged. The Motion for Decision in this case was filed only a week before the hearing. When Complainant waits until immediately before the hearing to file a motion for decision, it is almost inevitable that Complainant will have been prejudiced by the respondent's default.

13/ Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1992).